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No. 88-1302

IN THE

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

OPPOSING BRIEF OF RESPONDENTS A. DIXON WEATHERHEAD, M.D. and THE CLEVELAND CLINIC FOUNDATION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review petitioners' constitutional challenge to an Ohio law where the challenge was never raised below or considered by the courts of Ohio?

II. Whether the use of an objective standard for determining causation in an informed consent action violates petitioners' rights to privacy, due process or equal protection?

II.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent The Cleveland Clinic Foundation ("Clinic") is a 501(c)(3) not-for-profit corporation located in Cleveland, Ohio.[1] Respondent A. Dixon Weatherhead, M.D. ("Dr. Weatherhead") is a physician who treated petitioner Patricia Bohatch at the Clinic. Following her treatment at the Clinic, petitioner Patricia Bohatch was treated by respondent Charlotte Delhaes, M.D. at the Lake County Medical Center.

[1] The Clinic is affiliated with the Cleveland Clinic Florida, located in Ft. Lauderdale, Florida.

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STATEMENT OF THE CASE

On admission to the Clinic on May 27, 1983, Petitioner Patricia Bohatch was psychotic, delusional, hallucinatory and suicidal. Dr. Weatherhead commenced short term administration of a very low dose of the drug

Haldol. Haldol is a neuroleptic drug prescribed to relieve the symptoms of certain psychoses, including the paranoia and delusional thinking suffered by Mrs. Bohatch. It was the drug of choice and no drug alternative existed that did not have similar risks.

Dr. Weatherhead did not discuss the possible side effects of Haldol with Mrs. Bohatch prior to commencing administration of the drug because he considered her severely psychotic and incapable of understanding any questions about the effects of the medication. He further did not believe it would be in Mrs. Bohatch's best interest to discuss the therapy or anything of a confidential nature with Mr. Bohatch, who the doctor believed might be part of Mrs. Bohatch's problem.

When Haldol was discontinued during her admission, Mrs. Bohatch relapsed into severe paranoia. Administration of the drug was resumed with beneficial results. On discharge, Dr. Weatherhead informed Mrs. Bohatch that, if she did not take Haldol, she probably would suffer a relapse of her psychosis and develop again the morbid depression, intense guilt and paranoid delusions she previously suffered. He advised her to seek medical attention if she developed any side effects or inexplicable symptoms.

Six months after her discharge from the Clinic, Mrs. Bohatch developed a rare movement disorder called tardive dystonia. At trial, Respondents produced expert testimony that Haldol was properly prescribed and critical for controlling Mrs. Bohatch's psychotic, suicidal symptoms. The jury returned a defense verdict.

Petitioners appealed, but did not raise any constitutional issues. Petitioners argued that an improper jury instruction was given on informed consent; that the trial court erred in denying motions for

a directed verdict and for judgment notwithstanding the verdict; and that the jury verdict was against the manifest weight of evidence. Affirming the judgment, the Court of Appeals found that Petitioners waived any objection to the jury instructions which, in any event, properly stated the law of Ohio on informed consent. The Court found that the case was properly submitted to the jury and that the evidence was sufficient to support the jury's verdict.

On appeal to the Ohio Supreme Court, Petitioners raised essentially the same issues and made no federal claims. The Ohio Supreme Court declined to accept jurisdiction. Petitioners then filed a Petition for Writ of Certiorari in this Court arguing, for the first time, that Ohio's informed consent law is violative of the Ninth and Fourteenth Amendments of the United States Constitution.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because Petitioners failed to preserve the constitutional issues on appeal and because Ohio's law on informed consent is constitutional.

A.

PETITIONERS WAIVED THEIR CONSTITUTIONAL CLAIMS BY FAILING TO RAISE THEM IN ANY OF THE THREE LOWER COURTS REVIEWING THE CASE.

Petitioners raise for the first time in this Court a challenge to the constitutionality of Ohio's common law of informed consent. Petitioners did not raise a constitutional challenge in the trial court, the Ohio Court of Appeals or the Ohio Supreme Court. The federal claims have been waived and should not be considered by the United States Supreme Court.

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). Principles of comity in the federal system require that the state courts be afforded the opportunity to perform their duty and this Court has consistently refused to decide federal constitutional issues raised here for the first time. *Id.* at 499; *see also Bankers Life & Cas. Co. v. Crenshaw*, _____ U.S. _____, 108 S. Ct. 1645 (1988).

At no stage of the proceedings below did Petitioners raise a constitutional challenge or even refer to the constitutional provisions on which they base their petition. The courts of Ohio have not considered any constitutional challenge and no record has been developed for consideration in this Court. The federal claims were not preserved and the petition should be denied.

B.

OHIO'S APPLICATION OF AN OBJECTIVE STANDARD IN DETERMINING CAUSATION IN AN INFORMED CONSENT CASE DID NOT VIOLATE PETITIONERS' CONSTITUTIONAL RIGHTS.

Even if their federal claims were not waived, Petitioners fail to raise a legitimate constitutional issue before this Court. Under Ohio law, the tort of lack of informed consent is established when:

(a) The physician fails to disclose to the patient and discuss the material risks inherently and potentially involved with respect to the proposed therapy if any;

(b) The unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate of the injury to the patient; and

(c) A reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Nickell v. Gonzalez (1985), 17 Ohio St. 3d 136.

The objective standard applied in determining causation is not a limitation of personal right but rather a fair and practical means of deciding the causation issue after a claim is made. Since the landmark decision of the United States Circuit Court for the District of Columbia in *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972), courts throughout this country have adopted the objective standard and expressly rejected the subjective standard advanced by Petitioners.[2]

A subjective standard "ignores the practical problem with reliability of proof" (*Dessi v. United States*, 489 F. Supp. 722, 729 (D.Va. 1980)) and ultimately turns on the credibility of the hindsight of a person seeking recovery after he has experienced a most undesirable result. *Sard v. Hardy*, 379 A.2d 1014, 1025 (Md. App. 1977). *See also Cobbs v. Grant*, 502 P.2d 1, 11 (S.Ct. Calif. 1972).

> Since at the time of the trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers, he would have declined treatment. Subjectively he may believe so with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment.

Cobbs, 502 P.2d at 11.

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[2] *See Cobbs v. Grant*, 502 P.2d 1, 11-12 (S.Ct. Calif. 1972); *Fogal v. Genesee Hospital*, 344 N.Y.S.2d 552, 560 (N.Y. App. 1973); *Funke v. Fieldman*, 512 P.2d 539, 549-50 (S.Ct. Kan. 1973); *Bowers v. Garfield*, 382 F. Supp. 503, 506 (D. Pa. 1974); *Karp v. Cooley*, 493 F.2d 408, 422 n.18 (5th Cir. 1974); *Miller v. Kennedy*, 522 P.2d 852, 864 (Wash. App. 1974); *Scaria v. St. Paul Fire and Marine Ins. Co.*, 227 N.W.2d 647 (S.Ct. Wisc. 1975); *Hamilton v. Hardy*, 549 P.2d 1099, 1105 (Colo. App. 1976); *Sard v. Hardy*, 379 A.2d 1014 (Md. App. 1977); *Dessi v. United States*, 489 F. Supp. 722, 729 (D. Va. 1980); *Cunningham v. United States*, 683 F.2d 847 (4th Cir. 1982); *Hartke v. McKelway*, 707 F.2d 1544, 1550 (D.C. Cir. 1983).

The absolute sovereignty invoked by Petitioners simply is not realistic. If sovereignty is the only goal, a physician would be required to disclose all potential risks, however obscure and immaterial. Even then, a doctor would not satisfy the idiosyncratic patient whose fears may be irrational and unknowable. Inevitably, the only solution is a reasonableness standard.

The informed consent law of Ohio and the majority of states does not deprive an individual of privacy or due process or establish a favored class of defendants. The petition should be denied.

CONCLUSION

The federal claims advanced by Petitioners are raised for the first time before this Court. The claims were waived by Petitioners' failure to raise them below. The claims, moreover, lack substantive merit. Nothing in the opinions below merits this Court's review.

Respectfully submitted,

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